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Legal News and Analysis

How Companies Break the Law and Escape Liability Through Mandatory Arbitration Clauses

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Supreme Court decisions are often puzzling. The Court's decision in *AT&T Mobility v. Concepción* is particularly baffling in the world of consumer rights law. In *Concepción*, Justice Antonin Scalia held that the Federal Arbitration Act (FAA), which favors contractual arbitration clauses, preempts state consumer protection laws. Let's break down exactly what that means…

Concepción in a Nutshell

In *Concepción*, customers of AT&T brought a class action suit in a California district court alleging that AT&T's offer of a free phone for new cell phone customers was fraudulent because the customers actually had to pay sales tax on the "free"phone. AT&T argued that their cellphone contract with their customers contained a clause that provided for arbitration of all disputes and barred any class action lawsuit. Relying on California state law, however, the District Court found the arbitration clause unconscionable because it did not allow for class wide actions. The 9th circuit agreed, and held that the Federal Arbitration Act, which makes arbitration clauses enforceable, did not preempt the California state law. The case went up to the U.S. Supreme Court on appeal.

In a landmark decision, Justice Scalia, overturned the lower court's decision and held that the FAA preempts California's law regarding the unconscionability of arbitration waivers. Scalia's decision is momentous for two reasons. First, it limits a consumer's rights to take action against a company who breaks the law. Also, Scalia uses Congress's power and decides that the FAA, which clearly favors companies and disadvantages the consumer, trumps the California law which was enacted to protect consumers.

The Alliance for Justice Speaks Out

There are many reasons why arbitration agreements *are* unconscionable, and that's what makes the Court's decision so troubling. Alliance for Justice does a masterful job highlighting obvious instances where companies have broken the law, but have relied on *Conceptión* to escape liability by having their arbitration waivers enforced. The complete line of cases can be found here:http://www.afj.org/connect-with-the-issues/the-corporate-court/att-aftermath-stories.pdf.

Why Mandatory Arbitration Clauses Violate Consumers' Rights

- Arbitration clauses are often hidden in fine print and contain confusing language which the average consumer has trouble comprehending.
- Arbitration clauses are judicially inefficient. They require *each* consumer to go through the process of filling out paperwork and completing the necessary calls while foreclosing all class action proceedings. This process is difficult to comprehend (and time consuming!) for a consumer who has no legal training. Whereas, a class action suit allows for multiple consumers to bring a single action against a company and lets the attorney do the legal grunt work, *not* the consumer.
- Arbitration clauses allow companies to cheat and win. A company who violates the law and strategically adds an arbitration clause to its contract is allowed to settle disputes with individuals "behind closed doors." But class action suits are public knowledge, and settlements are widely reported in the main stream media. When the public knows companies cheat, companies are more likely to be deterred from continuing to break the law.
- Arbitration clauses create contracts of adhesion which are unreasonable because of the strong bargaining power that large companies possess. These "take it or leave it" deals further weaken the consumer's position at the time of sale.

What *Concepción* Means for the Future of Class Action Litigation

Mandatory arbitration clauses should continue to be a hot-button issue for the Supreme Court if articles like these continue to be published. There could be hope for the consumer and the future of class action lawsuits, despite the presence of a contractual arbitration clause, due to of the slim 5-4 ruling in *Concepción*. Perhaps the Court, in the future, might be swayed by Justice Breyer's dissent, where he asks this yet to be answered question:"Where does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration?" Consumers and class action attorneys, alike,hope that the Court will answer this question sooner than later (if at all).